No. 14-593

In The Supreme Court of the United States

TORREY DALE GRADY,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its Response, the State of North Carolina makes no effort to defend the constitutionality of its global positioning system (GPS) monitoring program. Instead, it argues that Petitioner's case is not worthy of the Court's attention and not a "good vehicle" for review of the question presented. In so doing, the State attempts to delegate away its responsibility to prove that it does not violate Petitioner's Fourth Amendment rights.

A. The State Fails to Articulate even a Cursory Defense of the Constitutionality of its GPS Monitoring Program.

The State could make two possible arguments to prove that its GPS monitoring program is not a violation of the Fourth Amendment: (a) that the monitoring is not a "search" for Fourth Amendment purposes; or (b) that such a search is reasonable. *See Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011) ("[A]ll searches and seizures must be reasonable."). It makes neither.

First, the State never argues that the GPS monitoring program does not constitute a search. Instead, it blames Petitioner for not providing direct evidence that the State actually obtains information through its GPS monitoring program, concluding that "there is no basis upon which this Court can determine whether North Carolina conducts a 'search'" by monitoring an individual. (Resp. 11.)

The argument is bizarre. According to the statute itself, the GPS program is "designed to monitor" certain categories of offenders. N.C. Gen.

Stat. § 14-208-40(a). Specifically, the statute requires that the GPS monitoring program "provides all of the following: (1) Time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology. (2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements." *Id.* § 14-208.40(c). To implement the program, the State has "the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed." *Id.* § 14-208.42. The idea that the State fails to obtain any information from such a program beggars belief. And the State, for its part, gives no alternative explanation.[1]

The State also implicitly questions whether the Fourth Amendment applies in civil cases, noting that Petitioner relies in part on cases dealing with physical intrusions in criminal investigations. (Resp. 12.) It writes that ". . . Petitioner virtually ignores this Court's Fourth Amendment jurisprudence deriving from civil settings other than to say that the Fourth Amendment applies there." (Resp. 12.) At no point, however, does the State dispute Petitioner's conclusion that the Fourth Amendment applies in civil settings. (*See* Resp. 10-12.) Nor could it, given this Court's definitive answering of the question. *See New Jersey v. T.L.O.*, 429 U.S. 325, 335 (1985)

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[1] The State is careful not to classify the monitoring as a punishment. Indeed, it has previously argued that the program is not a punishment when faced with an Ex Post Facto challenge. *See State v. Bowditch*, 364 N.C. 335 (2010).

("[W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities.").[2]

Failing to argue that its GPS monitoring program is not a search, the State does even less to argue that the program is "reasonable." Instead, it attempts to shift the burden, writing that Petitioner fails to prove that GPS monitoring is unreasonable. (Resp. 13 ("Petitioner conveniently ignores . . . the opportunity, *if not the obligation*, he had to adduce any evidence—statistical or otherwise—of the inefficacy of North Carolina's SBM program.") (emphasis added).)[3]

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[2] Petitioner also questions the State's classification of its GPS monitoring program as being civil in nature. The statutes that create the program, N.C. Gen. Stat § 14-208.40 *et seq.*, are located in Article 14 of the North Carolina General States, the Article entitled "Criminal Law." Moreover, the form order promulgated by the Administrative Office of the Courts upon which Petitioner was sentenced is labeled "AOC-CR-616." "CR" is the designation for criminal forms.

[3] The State notes that *United States v. Jones*, 132 S.Ct. 945 (2012), "expressly declined to address" the question of reasonableness. (Resp. 11. (". . . *United States v. Jones* does not stand for the proposition that the search there was unreasonable and unlawful.")) However, it completely ignores Petitioner's analysis of *Riley v. California*, 134 S.Ct. 2473 (2014), *Berger v. New York*, 388 U.S. 41 (1967), and the numerous other cases cited in the Petition that deal with the issue of "reasonableness." (*See*

Setting aside the fact that Petitioner did, in fact, provide data from a comprehensive recent study on the efficacy of GPS monitoring of sex offenders, (*see* Petn. 12-13), the State's efforts at burden-shifting run directly counter to this Court's previous decisions. An individual does not bear the "obligation" to prove that a search is inefficacious; instead, the relevant question is whether the Government's search is reasonable. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness' . . . .").

According to the State's line of reasoning, the Government can engage in any search so long as the individual is unable to affirmatively demonstrate that the search was not effective. This search-first-ask-questions-later method is precisely how GPS monitoring programs have been instituted throughout the country, and it is why such programs need to be subjected to this Court's scrutiny.

B. The Case Provides an Effective Vehicle for Resolving the Question Presented.

As it does nothing to defend the constitutionality of its GPS monitoring program on the merits, the State relies on the dual arguments that (a) the case is not a "good vehicle" for resolving the question presented and (b) the question presented does not warrant the Court's attention.

First, in arguing that this case does not provide a "good vehicle" for consideration of the

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Petn. 7-13.) In fact, Petitioner does not cite *Jones* once in his analysis of "reasonableness." (*See id.*)

issue, the State claims that Petitioner does not present details of the GPS monitoring program other than those laid out in *State v. Bowditch*, a decision by the Supreme Court of North Carolina from 2010. It thus insinuates, without basis, that the program has changed in the past four years. But the State does not dispute any of the details regarding the GPS monitoring program set forth in the Petition, and, in fact, the descriptions of the program in *Bowditch* match Petitioner's experience. Those details are laid out in the Statement of the Case. (Petn. 4-5.)

Most importantly, though, the question presented can be answered simply by an analysis of the statute itself. No details as to the niceties of how the program is implemented can change the fact that, on its face, N.C. Gen. Stat. § 14-208.40 *et seq.* establishes a monitoring program that continuously tracks an individual's movements. By definition, such a program requires a sweeping invasion on Petitioner's "person[], house[], . . . and effects." *See* U.S. Const. amend. IV.

Ultimately, the State's reasoning is another effort at burden-shifting. Instead of using its Response as an opportunity to argue for the constitutionality of its GPS monitoring program, the State again blames Petitioner, this time for failing to properly authenticate the details of the program. Of course, the State is perfectly positioned to dispute those details, yet it fails to do so, essentially seeking to insulate its monitoring program from review by revealing as little as possible about it.[4]

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[4] The State also notes that the North Carolina Court of Appeals and the Supreme Court of North

C. The Petition Presents an Important Federal Question.

Finally, the State argues that the Court should not grant the Petition because the North Carolina Court of Appeals' opinion and the Supreme Court of North Carolina's denial of discretionary review are not in conflict with the decision of any other state court of last resort or any circuit court. (Resp. 5.) However, Petitioner did not petition for certiorari based on a conflict between jurisdictions. Instead, Petitioner requested review on the grounds that the North Carolina courts answered an important federal question in a manner that conflicts with relevant decisions of this Court. (*See* Petn. 5-15.)

Petitioner further rejects the State's claims that the question presented is unimportant and that Petitioner's concerns are based on mere "speculation." (Resp. 8.) There simply can be no doubt that rapidly-evolving technology—including GPS monitoring—allows for surveillance that was unimaginable even ten years ago, and this Court has grappled with the implications of such technological advances in recent opinions. *See United States v.*

Carolina failed to engage in a "substantive analysis of Petitioner's Fourth Amendment argument" as a reason why the case is a poor vehicle for review. (Resp. 9-10.) It gives no precedent for the conclusion that such a failure on the part of the state courts should preclude review. Indeed, such a holding would incentivize lower courts to perform perfunctory analyses.

Jones, 132 S.Ct. 945, 954-57 (2012) (SOTOMAYOR, J., concurring) ("The net result is that GPS monitoring . . . may alter the relationship between citizen and government in a way that is inimical to democratic society." (internal quotations omitted)); *id.* at 957-64 (ALITO, J., concurring) (noting that the Court's opinion in that case was not based on "what is really important" about the case, namely, "the *use* of a GPS for the purpose of long-term tracking" (emphasis in original)); *Riley v. California*, 134 S.Ct. 2473, 2489-91 (2014) (examining the wealth of privacy interests implicated by a search of cell phone data, including access to GPS data that would allow a searcher to "reconstruct someone's specific movements down to the minute"). Indeed, the Court in *Jones* anticipated that a number of "vexing problems" concerning GPS monitoring would need to be considered "in some future case." *See Jones*, 132 S.Ct. at 954. This is just such a case.

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CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

February 18, 2015.

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